

THE INTELLECTUAL PROPERTY CHAPTER OF THE TRANS-PACIFIC PARTNERSHIP AGREEMENT AND INVESTMENT IN DEVELOPING NATIONS

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1. INTRODUCTION

The United States has some of the highest standards of intellectual property protection in the world, though many copyright and patent laws in the United States are limited through balancing provisions that provide exceptions to the exclusive rights conferred by the intellectual property system. The United States also currently has robust industries that rely on intellectual property protection, such as the Pharmaceutical Research Association of America (PhRMA), the Motion Pictures Association of America (MPAA) or the Recording Industry Association of America (RIAA), and their value is often increased through higher standards. It is one of the few net-exporters of intellectual property and, as a result, receives greater benefits from heightened intellectual property standards than do countries that are net-importers of these goods. While the United States has its own balance between intellectual property rights and the public interest in its domestic laws, often it seeks only to export the rights for rightholders without the corresponding limitations and exceptions.

The United States has engaged in efforts to raise intellectual property standards worldwide through the creation of new global norms such as through negotiations of the Trans-Pacific

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Partnership Agreement (TPP). One of the common arguments used in pushing for higher protections for intellectual property is that such standards will result in economic growth and development, either through burgeoning industries that rely on heightened intellectual property protection or through foreign direct investment.¹ However, studies have shown that “rapid [economic] growth is more often associated with weaker IP protection. In technologically advanced developing countries, there is some evidence that IP protection becomes important at a certain stage of development, but that stage is not until a country is well into the category of upper middle income developing countries.”² According to another study, factors including “cost conditions, market size, levels of human capital and infrastructural development and broad macroeconomic conditions”, as well as deregulation, have been found to be more important to foreign direct investment than the levels of intellectual property protection.³ In fact, countries like Brazil, China and India have seen high influxes of foreign direct investment, even with low levels of intellectual property protection.⁴

¹ See, e.g., Jay Taylor, *Protecting IP to Foster Economic Growth in Malaysia*, PHRMA (July 23, 2013), <http://www.phrma.org/catalyst/malaysia-protecting-ip-fosters-growth> (“[S]trengthening intellectual property protections [results] in an influx of foreign direct investment and trade in high technology products, and . . . increased levels of research and development and innovation in developed and developing countries”); Carlos A. Primo Braga & Carsten Fink, *The Relationship Between Intellectual Property Rights and Foreign Direct Investment*, 9 DUKE J. COMP. & INT’L L. 163, 165–66 (1998) (“[T]here is broad recognition that IPR systems play an important role in the promotion of technological progress.”). But see Amy Jocelyn Glass & Kamal Saggi, *Intellectual Property Rights and Foreign Direct Investment*, 56 J. INT’L ECON. 387 (2002) (finding that stronger IPR protection does not better protect individuals from imitation than Northern firms).

² Jean-Eric Aubert, *Promoting Innovation in Developing Countries: A Conceptual Framework* 26, (World Bank Policy Research Working Paper No. 3554, Apr. 2005).

³ TRANSNAT’L CORPS. & MGMT. DIV. OF THE U.N. DEP’T OF ECON. & SOC. DEV., *INTELLECTUAL PROPERTY RIGHTS AND FOREIGN DIRECT INVESTMENT* 3 (1993).

⁴ See, e.g., Peter K. Yu, *Intellectual Property, Foreign Direct Investment and the China Exception*, in *THE GLOBAL CHALLENGE OF INTELLECTUAL PROPERTY RIGHTS* 153, 153, 158 (Robert C. Bird & Subhash C. Jain eds., 2008) (noting that other factors also play a role in attracting foreign investment: “[i]n the case of China, foreign investors are usually not attracted by the strength of the country’s intellectual property protection. Rather, they entered the Chinese market because of the drastically lower production costs, the country’s enormous market, its inefficient economic system and the preferential treatment of foreign investors” and “if stronger intellectual property protection always led to more FDI, ‘recent FDI flows to developing economies would have gone largely to sub-Saharan Africa

Higher levels of intellectual property protection may therefore be unnecessary to attract investment in developing countries. Accepting these higher standards may not only be unnecessary in promoting investment, but can also result in negative impacts on development. Higher protections for copyrighted and patented goods raise the price of culture, education, and medicines that can detrimentally affect developing nations.⁵ Thus, developing countries carefully weigh the risks of accepting such higher standards, particularly where they are unnecessary in promoting investment and development.

2. U.S. HISTORY: RELIANCE ON FOREIGN INTELLECTUAL PROPERTY DURING DEVELOPING YEARS

The United States currently has very high standards of intellectual property protection, though historically this was not always the case. When the United States was still developing, it did not provide protection to foreign intellectual property owners.

Instead, the United States encouraged reliance on foreign works prior to the 1891 International Copyright Act.⁶ Recognition of foreign copyright in the United States, and increased intellectual property standards more generally, came not with the intention of attracting foreign direct investment, but rather because of external

and Eastern Europe . . . [rather than] China, Brazil, and other high-growth, large-market developing economies with weak IPRs.” (internal citations omitted)).

⁵ See Knowledge Ecology International, Letter dated Mar. 22, 2011 from Knowledge Ecology International addressed to Anand Grover, Special Rapporteur for the U.N.: Complaint About the Trans-Pacific Partnership Agreement Negotiation (Mar. 22, 2011), available at http://keionline.org/sites/default/files/r2h_anand_grover_tpp_22march2011.pdf (discussing how the Trans-Pacific Partnership Agreement Negotiation will negatively impact public health); Krista L. Cox, *The United States’ Demands for Intellectual Property Enforcement in the Trans-Pacific Partnership Agreement and Impacts for Developing Countries 2* (Knowledge Ecology Int’l, Working Paper, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2188029 (“[P]roposed higher levels of enforcement of intellectual property rights would impact access to knowledge and access to medical technologies, among other issues.”).

⁶ International Copyright Act of 1891, 26 Stat. 1106 (1891). The 1790 Copyright Act stated, “[N]othing in this act shall be construed . . . to prohibit the importation or vending, reprinting or publishing within the United States, of any map, chart, book or books, written, printed, or published by any person not a citizen of the United States, in foreign parts” Copyright Act of 1790, 1 Stat. 124 (1790).

and internal pressures. Domestically, it was seen as in the interest of the United States to recognize foreign copyrights as local stakeholders lobbied for strong protections. The University of California system and the University of Virginia, as well as Mark Twain, Louisa May Alcott and other prominent domestic authors, advocated for recognition of foreign copyright in order to ensure that their own copyrights would be recognized in foreign countries and that foreign works—which were often available at a fraction of the cost of domestic works—would not compete with their own works.⁷

Similarly, the first patent act only provided protection to citizens of the United States and, later after amendments, those who had been residents for at least two years or those intending to become citizens.⁸ Not until 1836 did the United States remove the restrictions regarding nationality on patenting, though the 1836 Act did charge nationals of other countries fees of ten to sixteen times higher than United States citizens and residents.⁹

Although the United States, while it was in its own stages of developing, provided low standards of intellectual property protection and did not recognize foreign copyrights or patents, it now seeks to push these high standards on the rest of the world. It has done so through a variety of mechanisms, perhaps most notably its annual “Special 301” lists—a unilateral process where the Office of the United States Trade Representative (USTR) creates a “watch list” of countries that do not implement high standards of protection, even though they may fully comply with international obligations—and through the negotiations of free trade agreements. Such efforts could be considered hypocritical and can slow the development of developing countries.

3. INTELLECTUAL PROPERTY PROVISIONS IN THE TRANS-PACIFIC PARTNERSHIP AGREEMENT

Since 2010, the United States has been engaged in negotiations for a large regional trade agreement known as the Trans-Pacific

⁷ See, e.g., Edward G. Hudon, *Mark Twain and the Copyright Dilemma*, 52 A.B.A. J. 56, 56 (1966) (“[I]n this country foreign authors were left to the mercy of literary pirates, and American authors suffered the same fate abroad.”).

⁸ Patent Act of 1790, 1 Stat. 109 (1790); Act of April 17, 1800, 2 Stat. 37 (1800).

⁹ Patent Act of 1836, 5 Stat. 117, § 9 (1836).

Partnership Agreement (TPP).¹⁰ The number of parties since the inception of the negotiations has grown and now includes twelve countries: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam and the United States.¹¹ The negotiations have taken place behind closed doors and the public has not been granted access to the negotiating texts or positions of the parties.¹²

Although none of the negotiating texts have officially been released, negotiating positions have come to light through various leaks.¹³ The United States' proposals have reflected aggressive provisions reflecting high standards of intellectual property protection that generally provide new rights to rightholders, without adequate balancing provisions for the public interest.¹⁴

¹⁰ STATEMENT OF THE MINISTERS AND HEADS OF DELEGATION FOR THE TRANS-PACIFIC PARTNERSHIP COUNTRIES, OFFICE OF THE U.S. TRADE REPRESENTATIVE (Dec. 13, 2013), available at <http://www.ustr.gov/tpp>.

¹¹ James Love, *Trans-Pacific Partnership Agreement (TPPA)*, KNOWLEDGE ECOLOGY INT'L (Dec. 13, 2010, 5:37 PM), <http://keionline.org/tpp>.

¹² *Id.* See also Complaint about the Trans-Pacific Partnership, *supra* note 5 (discussing the lack of transparency in the Partnership); Mike Masnick, *Members of Congress Demand USTR Open Up On TPP*, TECHDIRT (Sept. 6, 2012, 8:18 PM), <http://www.techdirt.com/articles/20120906/02034520290/members-congress-demand-ustr-open-up-tpp.shtml> ("We've been talking about the incredible and ridiculous level of secrecy that the USTR has kept with regards to the TPP negotiations. . . . [T]he public, and even key Congressional staffers are left out in the cold.").

¹³ The first of the three most notable leaks occurred in March 2011, when the United States' comprehensive proposal for intellectual property (tabled in the February 2011 round in Santiago, Chile) was leaked. Trans-Pacific Partnership, Intellectual Property Rights Chapter (Feb. 2011), available at <http://keionline.org/sites/default/files/tpp-10feb2011-us-text-ipr-chapter.pdf> [hereinafter U.S. Feb. 2011 Leaked Text]. The second leak, of the United States' proposals on pharmaceutical-related issues, occurred in October 2011. Trans-Pacific Partnership, Intellectual Property Rights Chapter (Sept. 2011), available at <http://www.citizenstrade.org/ctc/wp-content/uploads/2011/10/TransPacificIP1.pdf> [hereinafter U.S. Oct. 2011 Leaked Text]. The third, by Wikileaks in November 2013, contained the consolidated intellectual property text, including the negotiating positions of all parties. Trans-Pacific Partnership, Intellectual Property Rights Chapter (Aug. 2013) available at <http://wikileaks.org/tpp/static/pdf/Wikileaks-secret-TPP-treaty-IP-chapter.pdf> [hereinafter U.S. Nov. 2013 Leaked Text] (reflecting the text as of August 2013, a date which coincided with the last full negotiating round which took place in Bandar Seri Begawan, Brunei).

¹⁴ See Krista L. Cox, *Hot Topics in the Intellectual Property Chapter of the Trans-Pacific Partnership Agreement (TPP): How Will Things Shake Out?*, KNOWLEDGE

These higher standards of protection proposed by the United States include, *inter alia*, longer terms of protection for copyright, aggressive measures on “digital locks” or technological protection measures, patent term extensions, controversial measures to link patent status to drug registration, and high measures of damages.¹⁵ Overall, these proposals would result in higher costs for copyrighted and patented goods. In some areas of the intellectual property text, it appears that the United States proposals specifically target the domestic laws or intellectual property practices of India¹⁶ or China,¹⁷ in an attempt to create new global norms that would isolate these countries.

For many of the parties to the negotiations, particularly developing nations, the United States’ proposals, if accepted, would require changes to their domestic laws, impacting access to knowledge and access to medicines. These proposed provisions often go well beyond international treaties and are not part of the

ECOLOGY INT’L (Sept. 3, 2013, 12:12 PM), <http://keionline.org/node/1794> (describing controversial and potential problems in the TPP Agreement).

¹⁵ *Id.* See also Cox, *supra* note 5 (describing the United States’ proposed measures in the agreement).

¹⁶ Compare, e.g., The Patents Act, No. 39 of 1970, A.I.R. Manual (1979), vol. 27 (India), § 3(d) (stating that a new invention does not include “the mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or the mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant”) with U.S. Feb. 2011 Leaked Text, *supra* note 13, at art. 8.1 (“In addition, the Parties confirm that: patents shall be available for any new forms, uses, or methods of using a known product; and a new form, use, or method of using a known product may satisfy the criteria for patentability, even if such invention does not result in the enhancement of the known efficacy of that product.”). Similarly, Article 25 of the Indian Patent Act explicitly permits systems of pre-grant opposition “[w]here an application for a patent has been published but a patent has not been granted, any person may, in writing, represent by way of opposition to the Controller against the grant of patent,” Patent Act § 25 (1970), while Article 8.7 of the U.S. Feb. 2011 Leaked Text would prohibit pre-grant opposition “[w]here a Party provides proceedings that permit a third party to oppose the grant of a patent, a Party shall not make such proceedings available before the grant of the patent.” Trans-Pacific Partnership, Intellectual Property Rights Chapter, *supra* note 13, at art. 8.7.

¹⁷ Mike Palmedo, *President Obama: Intellectual Property Provisions in the TPP “Will Help Us in Our Negotiations with China”*, INFOJUSTICE.ORG (Oct. 14, 2013), <http://infojustice.org/archives/30965>.

current legal regimes of many of the TPP parties.¹⁸ Why, then, would developing countries like Malaysia and Vietnam, or wealthier nations with smaller markets like New Zealand and Brunei, agree to these higher standards that are likely to increase costs for education and make it more difficult to protect the public health?

In an agreement like the TPP, the intellectual property chapter does not exist in a vacuum and consideration must be given to the over twenty other chapters. Pressure to accept these proposals on intellectual property can arise in exchange for the United States, the country with the largest economic market, making concessions in other areas, such as better market access for dairy, sugar, rice or textiles—goods that other countries export. Intellectual property simply is not a priority for many of the TPP negotiating parties, particularly in comparison to market access for their key exports.

4. BALANCING THE PUBLIC INTEREST: PRESERVING FLEXIBILITIES

All countries, but particularly developing countries, should carefully consider the effect that higher intellectual property rights protection will have on important public interest values such as education and the public health. Although all negotiating parties are members of the World Trade Organization (WTO) Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) and therefore bound by minimum international standards, TRIPS provides for numerous flexibilities that permit members to implement the agreement in various ways that take into account the public interest.

One primary flexibility of the TRIPS Agreement lies in the fact that many terms used are left undefined, thereby allowing

¹⁸ Many of the aforementioned proposals have already been accepted by those countries with existing free trade agreements with the United States. *See generally, e.g.,* Free Trade Agreement, U.S.-Australia, ch. 17, Jan. 1, 2005, *available at* http://www.ustr.gov/sites/default/files/uploads/agreements/fta/australia/as_set_upload_file469_5141.pdf; Free Trade Agreement, U.S.-Chile, ch. 17, Jan. 1, 2004, *available at* http://www.ustr.gov/sites/default/files/uploads/agreements/fta/chile/asset_upload_file912_4011.pdf; Free Trade Agreement, U.S.-Peru, ch. 16, Feb. 1, 2009, *available at* http://www.ustr.gov/webfm_send/1031; Free Trade Agreement, U.S.-Singapore, Jan. 1, 2004, *available at* http://www.ustr.gov/sites/default/files/uploads/agreements/fta/singapore/asset_upload_file708_4036.pdf. *See also* Public Citizen, *TPP Countries Resource Page*, <http://www.citizen.org/TPP-country-resource-page> (providing comparisons of current regimes with prior leaked text).

countries to determine for themselves, according to their national context, how to interpret standards such as, for example, the terms used for establishing patentability criteria of “new,” “inventive step,” and “capable of industrial application.”¹⁹ For example, such flexibility permits countries to set higher standards for patentability, among other areas. The initial proposal by the United States in February 2011 revealed efforts to restrict this flexibility by expressly defining such terms in a manner that would effectively lower patentability criteria.²⁰

Another critical flexibility expressly exists in Article 6 of the TRIPS Agreement, which notes that, “nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.”²¹ This article permits each member to determine whether to implement systems of national, regional, or international exhaustion of goods. Lower-income countries or those with smaller markets often prefer international exhaustion, in order to ensure that the country can import goods protected by intellectual property.²² Parallel importation can allow countries to access goods like books, movies, and medicines, often at more affordable prices. Sometimes, goods are not even available in certain markets. These markets are ignored by right holders who choose not to invest, either because of the low-income status of the country or, in the case of certain high-income countries, because of the smaller size of their markets.²³ The proposed text tabled by the United States in February 2011 included a provision that would

¹⁹ Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 27.1, Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1197 [hereinafter TRIPS Agreement].

²⁰ U.S. Feb. 2011 Leaked Text, *supra* note 13, at art. 8.

²¹ TRIPS Agreement, *supra* note 19, at art. 6.

²² See Alberto Cerda, *USTR New Exclusive Right for Copyright Holders: Importation Provision in the Trans Pacific Partnership Agreement (TPPA)*, KNOWLEDGE ECOLOGY INT'L (July 5, 2011, 10:00 PM), <http://keionline.org/node/1176> (“[S]ome TPPA negotiating parties have adopted international exhaustion of rights into their domestic laws, which means right holders do not control international free flow of their works Sacrificing consumers’ interest is highly problematic for those countries, because they cannot enjoy any advantage of scale economies”); Brief for Knowledge Ecology Int’l as Amici Curiae Supporting Neither Party, *Kirtsaeng v. John Wiley & Sons*, 133 S.Ct. 1351 (2013) (No. 11-697), 2012 WL 2867812, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2109718 (discussing the application of exhaustion in U.S. law).

²³ *Id.*

ban parallel importation of most copyrighted works.²⁴ Subsequent to that proposal, the Supreme Court decided in *Kirtsaeng v. John Wiley & Sons* by a 6–3 margin that the United States implements a system of international exhaustion and the first sale of a copyrighted good anywhere in the world exhausts the rights of the rightholder, thereby permitting parallel importation.²⁵ This ruling, which settled a circuit split amongst the federal appellate courts, directly conflicted with the United States’ proposal in the TPP. Even several months after the Court’s ruling in March 2013, the United States’ proposal regarding parallel importation remained unchanged, as reflected in the August 2013 text leaked by Wikileaks.²⁶

The TRIPS Agreement also permits certain exclusions from patentability under Articles 27.2 and 27.3 including to “protect *ordre public* or morality,” as well as specific exclusions for diagnostic, therapeutic and surgical methods, and plants and animals.²⁷ Again, the February 2011 text by the United States sought to limit these flexibilities. For example, the initial proposal for the intellectual property chapter added the word “only” to the exclusion of that which is necessary to protect *ordre public* or morality, limiting this provision further than Article 27.2 of the TRIPS Agreement.²⁸ The United States’ initial proposal also would reverse the explicit exception contained in Article 27.3 of the TRIPS Agreement, instead *requiring* the patenting of medical methods and plants and animals.²⁹ The August 2013 text reflected some changes to the initial United States’ proposal, and Article 27.2 of TRIPS is replicated in the agreed-to text of the TPP without the word “only.”³⁰ Furthermore, the United States modified its language regarding patenting of diagnostic, therapeutic and surgical

²⁴ U.S. Feb. 2011 Leaked Text, *supra* note 13, at art. 4.2.

²⁵ *Kirtsaeng v. John Wiley & Sons*, 133 S.Ct. 1351 (2013).

²⁶ U.S. Nov. 2013 Leaked Text, *supra* note 13, at art. QQ.G.3.

²⁷ TRIPS Agreement, *supra* note 19, at arts. 27.2, 27.3.

²⁸ U.S. Feb. 2011 Leaked Text, *supra* note 13, at art. 8.3.

²⁹ *Id.* at art. 8.2.

³⁰ Compare U.S. Feb. 2011 Leaked Text, *supra* note 13, at art. 8.3 (“Each Party may *only* exclude from patentability inventions, the prevention within its territory of the commercial exploitation of which is necessary to protect *ordre public* or morality” (emphasis added)) with U.S. Nov. 2013 Leaked Text, *supra* note 13, at art. QQ.E.1.2 (“Each Party may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre public* or morality”).

methods, though its proposal has not garnered the support of a single other TPP negotiating party.³¹

Another key flexibility contained in the TRIPS Agreement exists in Article 31 governing compulsory licenses or “[o]ther [u]se [w]ithout [a]uthorization of the [r]ight [h]older.”³² The TRIPS Agreement explicitly permits governments to allow the production of patented products even absent the consent of the rightholder. Each member to the TRIPS Agreement has the sovereign right to issue a compulsory license and determine the circumstances under which such a license may be granted. In 2001, WTO members concluded the Doha Declaration on TRIPS and Public Health (“Doha Declaration”), a statement that largely confirmed the rights of members to protect the public health and definitively affirmed some existing flexibilities.³³ Although some rightholders and governments have tried to limit the Doha Declaration to a set of specific diseases or cases of national emergency, including, arguably, through the United States’ initial text on the Doha Declaration contained in its TPP proposal,³⁴ the WTO has

³¹ See U.S. Nov. 2013 Leaked Text, *supra* note 13, at art. QQ.E.1.3(b).

³² TRIPS Agreement, *supra* note 19, at art. 31.

³³ World Trade Organization, Ministerial Declaration of Nov. 14, 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002) [hereinafter Doha Declaration]. See also World Trade Organization, *TRIPS and Health: Frequently Asked Questions: Compulsory Licensing of Pharmaceuticals and TRIPS*, http://www.wto.org/english/tratop_e/trips_e/public_health_faq_e.htm (last visited March 1, 2014) (“For the main part the declaration was important for clarifying the TRIPS Agreement’s flexibilities and assuring governments that they can use the flexibilities, because some governments were unsure about how the flexibilities would be interpreted.”).

³⁴ Compare World Trade Organization, *TRIPS and Health*, *supra* note 33 with U.S. Oct. 2011 Leaked Text, *supra* note 13, at art. x (declining to reference the Doha Declaration, the United States’ proposal on pharmaceuticals tabled in September 2011 incorporates portions of the language of the Declaration while omitting other sections. This selectivity of the language contained in Doha could be read as an attempt by the United States to limit its application to “HIV/AIDS, tuberculosis, malaria and other epidemics as well as circumstances of extreme urgency or national emergency.” As a result, efforts to address non-communicable diseases or other non-epidemics, non-urgent situations could be threatened by the language proposed by the United States for the TPP). See also Brook K. Baker, *US Doha Flexibilities in its Proposed TPP IP Text Are Not Nearly Good Enough*, INFOJUSTICE.ORG (Oct. 23, 2011), <http://infojustice.org/resource-library/us-doha-flexibilities-in-its-proposed-tpp-ip-text-are-not-nearly-good-enough> (“[C]lose analysis [of the Oct. 2011 leaked text] proves that the words chosen do not provide sufficient guarantees to assure that TPPA partners will be able to make maximum use of TRIPS and Doha compliant flexibilities to maximize access to

confirmed that a government does not need to limit issuance of a compulsory license to emergencies: “This is a common misunderstanding. The TRIPS Agreement does not specifically list the reasons that might be used to justify compulsory licensing. However, the Doha Declaration on TRIPS and Public Health confirms that countries are free to determine the grounds for granting compulsory licences.”³⁵

The TRIPS Agreement also permits governments to address anti-competitive behavior and abuses of intellectual property rights.³⁶ Both the United States and Japan have opposed a provision supported by the other ten TPP negotiating parties that would permit parties to address “(a) the abuse of intellectual property rights by right holders or the resort to practices that unreasonably restrain trade or adversely affect the international transfer of technology; and (b) anticompetitive practices that may result from the abuse of intellectual property rights . . .”³⁷ signaling the intention to limit this flexibility.

While the above list of flexibilities is not exhaustive, it reflects some key areas where the United States has sought to change global norms and limit existing flexibilities under international law. These flexibilities provide important mechanisms for countries to address abuses by rightholders and create intellectual property systems that take the public interest into account. In order to protect serious public interest concerns including, *inter alia*, education and public health, negotiating partners in the TPP should preserve these TRIPS flexibilities.

One tactic a country might take to protect the public with respect to intellectual property would be simply to point to existing international standards and try to limit obligations to these minimum standards, such as those found in the TRIPS Agreement. Even with agreements that go beyond TRIPS and create new rights, such as the World Intellectual Property Organization (WIPO) Copyright Treaty and WIPO Performances and Phonograms Treaty, these international agreements tend to be less aggressive than the United States’ proposals in the TPP and permit greater flexibility in implementation.³⁸ For example, the United

more affordable medicines for all.”).

³⁵ World Trade Organization, *TRIPS and Health*, *supra* note 33.

³⁶ TRIPS Agreement, *supra* note 19, at art. 40.

³⁷ U.S. Nov. 2013 Leaked Text, *supra* note 13, at art. QQ.A.9.

³⁸ Compare WIPO Copyright Treaty (WCT), art. 11, *adopted* Dec. 20, 1996, 36

States' copyright-related proposals on technological protection measures and Internet service provider (ISP) liability are based on the Digital Millennium Copyright Act (DMCA), legislation in which the proponents admitted the provisions went far beyond international obligations.³⁹ Harm may therefore be mitigated by accepting the TRIPS-plus measures that exist in other international agreements and agreeing to ratify these treaties, but rejecting the specific provisions of the proposed TPP text that limit flexibilities or direct countries to implement treaties in a particular manner.

Furthermore, although the intellectual property chapter may not be considered the most important chapter for many of the parties to the TPP, in large trade agreements with wide ranging levels of development, one might argue that greater leverage exists than in a bilateral trade agreement. In a large scale agreement between numerous parties, like the TPP, developing countries may choose to form voting blocs and support each other on key issues, either by attributing support to proposals made by other developing countries or by opposing aggressive provisions by the United States. A group of five countries across the development spectrum—Canada, Chile, Malaysia, New Zealand and Singapore—in fact came together to draft and table a counterproposal to the United States with respect to pharmaceuticals.⁴⁰ After the proposal was tabled, Vietnam joined

I.L.M. 65 (entered into force Mar. 2, 2002) ("Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures") and WIPO Performances and Phonograms Treaty (WPPT), art. 18, *adopted* Dec. 20, 1996, 36 I.L.M. 76 (entered into force May 20, 2002) ("Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms") with U.S. Feb. 2011 Leaked Text, *supra* note 13, at art. 4.9 (outlining specific remedies and consequences for circumventing the partnership agreement).

³⁹ See Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised*, 14 Berkeley Tech. L.J. 519, 537 (1999) ("Although Administration officials admitted in Congressional testimony that its preferred legislation went beyond what the WIPO Copyright Treaty required, it argued for this broader rule in part to set a standard that would help the U.S. persuade other countries to pass similarly strong rules.").

⁴⁰ Krista Cox, *TPP Negotiating Parties' Counterproposal to the US on Medicines Represents a More Flexible Approach*, KNOWLEDGE ECOLOGY INT'L (Nov. 14, 2013, 8:39 AM), <http://keionline.org/node/1826>. Reportedly, Australia was one of six countries that took part in initially drafting this proposal, but Australia dropped from the group when the text was tabled during the August 2013 round in Brunei due to the period of elections taking place domestically. *Id.*

support in many portions of the counterproposal, which largely reflected the standards of the TRIPS Agreement, including explicitly preserving many TRIPS flexibilities.⁴¹

Alternatively, however, an argument can be made that because the United States represents a disproportionate percentage of the economy in the TPP—particularly before latecomer parties, Canada, Mexico and Japan⁴²—it “has more political and economic leverage over the other parties in the TPP” and “is able to rely more on its sheer economic and geopolitical strengths to push for provisions that are in the interest of its intellectual property industries.”⁴³ Furthermore, as discussed *supra*, the United States may offer concessions in other chapters in exchange for receiving support for its intellectual property provisions.⁴⁴ Thus, the voting blocs may quickly disintegrate once the United States makes concessions in particular areas of concerns to countries that have opposed the United States’ proposals.

Countries might also try to use current international will and trends in an attempt to resist the United States’ TRIPS-plus proposals. In June 2013, for example, a WIPO diplomatic conference successfully concluded the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled⁴⁵ and fifty-one

⁴¹ *Id.*

⁴² Canada and Mexico joined the negotiations on December 2012 during the round that took place in Auckland, New Zealand. Japan entered the negotiations on the last day of the round that took place in Kota Kinabalu, Malaysia in July 2013. The first official round of the TPP negotiations took place in 2010.

⁴³ Peter K. Yu, *The Alphabet Soup of Transborder Intellectual Property Enforcement*, 60 *DRAKE L. REV. DISCOURSE* 16, 25–26 (2012). Yu notes that the TPP negotiations may be more dangerous than the Anti-Counterfeiting Trade Agreement, an intellectual property enforcement agreement negotiated between primarily high-income, developed countries. Yu notes, “[a]lthough the ACTA negotiations brought together two major intellectual property powers—the European Union and the United States—the continuous disagreements between these two powers resulted in the adoption of a more moderate agreement.” *Id.* at 25.

⁴⁴ *Id.* at 27 (“Because of the different value negotiating parties place on trade and trade-related items, some parties may be willing to concede more on intellectual property protection and enforcement in exchange for greater benefits in other trade or trade-related areas.”).

⁴⁵ Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, *adopted* June 27, 2013, WIPO Doc. VIP/DC/8 Rev. [hereinafter Marrakesh Treaty]. Although the treaty is not yet in force, among the TPP negotiating parties, Chile, Peru and the United States have all signed the agreement. *WIPO Administered Treaties*,

countries immediately signed, a record number of signatures during a WIPO treaty signing ceremony.⁴⁶ Significantly, this treaty represented the first conclusion of a WIPO human rights treaty or agreement designed to primarily serve the interests of the users of intellectual property goods rather than the rightholder. The Marrakesh Treaty created minimum standards for limitations and exceptions to copyright rather than minimum standards for protection of copyright. Currently, WIPO also appears to be considering other treaties in the interest of users of intellectual property, such as one for libraries and one on education.⁴⁷ TPP parties may try to leverage the international will in promoting the positive agenda and ensuring robust limitations and exceptions to intellectual property rights in the context of the trade agreement.

5. CONCLUSION

The choice to institute higher levels of intellectual property protection, particularly without proper balancing mechanisms to protect the users, can detrimentally affect the public interest. Even with the promise of foreign direct investment or greater market access to economies such as the United States, caution must be taken to ensure that certain TRIPS flexibilities are preserved so that these countries can further develop. Furthermore, and as discussed above, foreign direct investment is often more dependent on factors other than the levels of intellectual property protection and economies such as India or China are seeing increased levels of investment, despite lower levels of protection.

One might also consider what the important trends are in intellectual property investment. While certainly the traditional content industries remain viable investment choices, recent years

Marrakesh *VIP* *Treaty*, WIPO, http://www.wipo.int/wipolex/en/wipo_treaties/parties.jsp?treaty_id=843&group_id=1 (last visited Mar. 2, 2014).

⁴⁶ Thiru Balasubramaniam, 28 *June 2013: 51 Signatories to the Marrakesh Treaty*, KNOWLEDGE ECOLOGY INT'L (July 2, 2013, 4:17 AM), <http://keionline.org/node/1769>.

⁴⁷ See WIPO, Standing Committee on Copyright and Related Rights, 26th Sess., Dec. 16–20, 2013, Draft Agenda, Agenda Item 7–8, SCCR/26/1 Prov. (May 13, 2013) (indicating that “[l]imitations and exceptions for libraries and archives” and “[l]imitations and exceptions for educational and research institutions and for persons with other disabilities” are agenda items).

have seen the growth of “fair use” industries.⁴⁸ These industries depend on or benefit from limitations and exceptions, most notably “fair use,” as a critical component to their business models rather than relying on the creation of higher levels of intellectual property protection. Such industries may include manufacturers of certain consumer devices, programmers, software developers, educational institutions, Internet search and web-hosting providers, among others. A 2011 study of fair use industries in the United States highlighted that these industries represent one-sixth of total GDP, amounting to \$17.7 million.⁴⁹ In 2008 and 2009, fair use industries reportedly “generated total revenue averaging \$4.6 trillion, a 35 percent increase over 2002 revenue of \$3.4 trillion.”⁵⁰ Exports for fair use industries increased sixty-four percent from 2002 to 2008.⁵¹ Singapore, after amending its copyright law to expand fair use, saw an increase in annual growth for its private copying industries.⁵² As these fair industries grow and contribute to an increasing percentage of a country’s GDP, it may be time to rethink whether continually ratcheting up intellectual property protections will ultimately cause more harm than good, not only in terms of the public interest in accessing patented and copyrighted goods, but also with respect to contributions to the economy as new technologies and industries arise.

⁴⁸ See generally THOMAS ROGERS ET. AL., ECONOMIC CONTRIBUTION OF INDUSTRIES RELYING ON FAIR USE (2011).

⁴⁹ *Id.* at 21.

⁵⁰ *Id.*

⁵¹ *Id.* at 26.

⁵² ROYA GHAFELE & BENJAMIN GILBERT, THE ECONOMIC VALUE OF FAIR USE IN COPYRIGHT LAW: COUNTERFACTUAL IMPACT ANALYSIS OF FAIR USE POLICY ON PRIVATE COPYING TECHNOLOGY AND COPYRIGHT MARKETS IN SINGAPORE 5 (2012), (“Prior to the amendment of fair use policies, private copying technology industries experienced –1.97% average annual growth. After the changes were introduced, the same industries enjoyed a 10.18% average annual growth rate.”).